Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOSEPH P. SCOLIERI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE INTRODUCTION INTO EVIDENCE OF REPEATED AND PERVASIVE REFERENCES TO PETITIONER'S ALLEGED ASSOCIATION WITH CONVICTED FELONS AND TO THEIR CRIMINAL ACTS, CRIMINAL ASSOCIATES AND CRIMINAL ORGANIZATIONS WAS PLAIN ERROR UNDER THE STANDARD DEFINED BY *United States v. Olano*, 507 U.S. ——, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

II. WHETHER REFERENCE TO A WITNESS' PLACEMENT IN THE WITNESS PROTECTION PROGRAM WAS PLAIN ERROR.

III. WHETHER THE "TWO-INFERENCE CHARGE" IS INCONSISTENT WITH THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT AND WHETHER THE CHARGE COMPRISED PLAIN ERROR.

LIST OF PARTIES

The Indictment filed against Petitioner named four persons as defendants: Petitioner Joseph P. Scolieri, Gary E. Reder, Gregory L. Scolieri and Richard Brown. Gary Reder and Gregory Scolieri entered pleas of guilty to tax fraud and money structuring and testified for the government at trial. Richard Brown's case was severed and was tried separately. He was found guilty of conspiring with Petitioner Scolieri to possess cocaine with intent to distribute, and his conviction was affirmed by the United States Court of Appeals for the Third Circuit at No. 94-3115.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph P. Scolieri respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 18, 1994, rehearing denied on September 19, 1994.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reproduced in the Appendix, *infra,* at 1a. The district court did not issue an opinion.

JURISDICTION

Petitioner was charged by indictment in the United States district court with violating federal criminal statutes. Judgment of conviction was entered on January 7, 1994. On August 18, 1994 the court of appeals entered its judgment affirming the conviction. 15a. Petition for

Rehearing In Banc was denied by order entered September 19, 1994. ——.

The jurisdiction of this Court to review a judgment of the court of appeals is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

No person . . . shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case presents the question whether guilt by association is to be tolerated as a method of proof at the trial of a criminal accused.

Petitioner Joseph P. Scolieri is a thirty-two year old man who was convicted of conspiracy to distribute cocaine, money structuring, money laundering and tax offenses. He is serving a term of imprisonment under the Sentencing Guidelines of fifteen years, eight months.

The named coconspirator on the drug conspiracy count was Richard Brown. Brown's case was severed, and he did not testify at Petitioner's trial. Two unindicted coconspirators, Michael Rosenfeld and Irwin Levie, were the government's principal witnesses at trial. Rosenfeld set up the business and claimed to have brought Scolieri into it. Levie was Rosenfeld's Florida source for cocaine.[1]

The primary question presented for review involves the introduction into evidence of numerous and pervasive references to Petitioner's alleged association with convicted felons and racketeers and to other criminal acts, criminal

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[1] Rosenfeld and Levie had both been convicted of racketeering and sentenced to twelve and one-half and thirteen years, respectively. After their testimony at Petitioner's trial, both had their sentences reduced to five years.

associates and criminal organizations. The associational references principally concerned Lou Raucci, Charles Porter and two of their associates, Henry Zottola and Sam Tedesco. These people were not coconspirators and were not otherwise implicated by the Indictment in the charges Petitioner sought to defend at trial.

The associational evidence put before the jury by the government in this case included the following, *inter alia*:

(a) that Petitioner knew Lou Raucci;

(b) that the spaghetti place where Petitioner worked was financed by Lou Raucci;

(c) that Lou Raucci was a "full-time criminal" and convicted racketeer;

(d) that Lou Raucci ran a "criminal organization";

(e) that Lou Raucci took a percentage from the criminal activity in the Pittsburgh area;

(f) that Charles Porter and Henry "Zebo" Zottola were criminal associates of Raucci's;

(g) that witnesses were in fear of Raucci, Porter and Zottola;

(h) that Porter had been convicted of racketeering;

(i) that Petitioner knew Porter and Zottola;

(j) that Sam Tedesco was a criminal associate of Raucci's;

(k) that Tedesco was a "tough guy" who "whacked" people;

(l) that witnesses were in fear of Tedesco;

(m) that the father of a defense witness had spent time in a federal prison for stealing cars; and

(n) that Petitioner was acquainted with the witness' father.

In addition, evidence that a witness had been placed into the Witness Protection Program was put before the

jury.[2] Petitioner argued below that such evidence was inherently prejudicial and contributed to the penumbra of danger and dangerous associates created by the government in this case.

None of this evidence was relevant to the charges faced by the accused at trial. Petitioner was not charged with racketeering. He was not charged with participating in a criminal organization with Lou Raucci. He was not charged with "whacking" people. He was not charged with unlawful consortium with Charles Porter and "Zebo" Zottola. And he was not charged with stealing cars in confederacy with a witness' 72 year old father. That is, nonetheless, the kind of evidence the government persistently and intentionally adduced against the accused at trial.

With a single exception, defense counsel did not object to the introduction of such evidence. The standard of review under Federal Rule of Criminal Procedure 52(b) was therefore plain error. On the single occasion where defense counsel did object, the government admitted to the court that its purpose of eliciting such reference was to demonstrate the "association" of Joe Scolieri with these convicted racketeers. The one objection made by defense counsel was sustained by the trial court.

Petitioner argued below that under this Court's holding in *United States v. Olano,* 507 U.S. ——, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), because the errors affected rights that were of constitutional dimension, prejudice should be presumed. Petitioner argued in the al-

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[2] The trial judge, rather than the government, was responsible for this reference. On cross-examination of Michael Rosenfeld, defense counsel asked whether one of the perks Rosenfeld received in return for his cooperation was preferential institutional placement. The trial judge interrupted the examination and admonished counsel before the jury as follows: "He is in the Witness Protection Program and you should not be getting into his whereabouts."

ternative that even if an affirmative showing of prejudice was required, it was easily met on the record presented here.

The lower court affirmed the conviction without discussion of *Olano*. The court found the complained of references admissible on the theory that because Michael Rosenfeld had a long association with Lou Raucci, references to Raucci were, "bound to get before the jury." 5a. The court concluded that whether or not the government may have acted improperly in persistently adducing such testimony, the complained of references, "did not cause significant incremental prejudice to Scolieri." 5a.

The admissibility of this associational evidence is the principal question presented for review. A subsidiary question is whether the lower court's holding is consistent with *United States v. Olano*, supra, on the question whether the errors affected substantial rights.

The final question presented for review involves the propriety of the "two-inference" charge in defining the standard of proof. In its instructions to the jury the district court charged that if the jury viewed the evidence in the case as reasonably permitting either the inference that the defendant was guilty, or the inference that the defendant was not guilty, then the jury should vote to acquit. No objections were made to the instructions at the time of trial. The issue was reviewed on appeal for plain error. The court below held that the charge was not error, "much less plain error". 14a. Whether the "two-inference" charge is constitutionally offensive in diluting the standard of proof beyond a reasonable doubt is the final question presented for review.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW SIGNALS A SIGNIFICANT DEVIATION FROM ESTABLISHED PRECEDENT ON THE ADMISSIBILITY OF ASSOCIATIONAL EVIDENCE, *i.e.*, EVIDENCE THAT THE ACCUSED ASSOCIATED WITH PERSONS CONVICTED OF CRIME AND EVIDENCE OF THE OTHER CRIMINAL ACTS OF SUCH PERSONS.

Petitioner respectfully submits that if the lower court's holding is not reviewed, there will be little or nothing left to restrain the government from contaminating criminal prosecutions with constant references to other criminal acts, criminal associates and criminal organizations.

The fact that the court of appeals chose not to submit its opinion for publication does not lessen its potential for causing harm to the criminal process. The result in this case will be read by federal prosecutors as a signal of the court's readiness to tolerate such evidentiary abuses. The court's affirmance, on the record presented here, pushes standards of fairness to the edge of becoming irrelevancies.

Further, the opinion in this case cannot be reconciled with decisions from other circuit courts of appeals regarding the admissibility of associational evidence.

See, *United States v. Singleterry*, 646 F.2d 1014, 1020 (5th Cir. 1981) (plain error for government to elicit evidence of defendant's association with convicted felon); *United States v. Cardall*, 885 F.2d 656, 671-72 (10th Cir. 1989) (evidence of the "bad acts of defendant's other associates" highly prejudicial; conviction reversed); *United States v. McConnell*, 988 F.2d 530, 53 (5th Cir. 1993) (reversing conviction based on the "highly prejudicial effect of the introduction of evidence which suggests guilt by association"); *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982) (reversing based on "a highly prejudicial attempt to taint defendant's character through 'guilt by association' "); *United States v. Brum-*

ley, 560 F.2d 1268, 1280 (6th Cir. 1977) (reversible error to admit evidence regarding unlawful activity of company which employed defendant); *United States v. Whitaker*, 619 F.2d 1142, 1146-48 (5th Cir. 1980) (reversible error to admit evidence that defendant was affiliated with a union that was involved in unlawful activity); *Government of Virgin Island v. Archibald*, 987 F.2d 180, 184 (3d Cir. 1993) (evidence of, "any extrinsic acts that might adversely reflect on the actor's character" prohibited).

The government's position on appeal was not to deny its purposeful use of such evidence, but to assert that its conduct in introducing and exploiting such evidence should be ratified by the court. And it was.

That this was a result-oriented holding is apparent from the manner in which the court below sought to justify it. First, the lower court opted to treat the issue as one of prosecutorial misconduct. 4a. Prosecutorial misconduct was not the issue presented on appeal. Phrasing the issue as one of misconduct imposes a stiffer burden on the defendant, generally requiring the defendant to demonstrate intentional or reckless wrongdoing by the prosecutor. No such burden is imposed when the question presented is whether the pervasive use of improper evidence at trial comprised plain error. Although the prosecutor's conduct in purposefully exploiting such references to secure a conviction is certainly relevant to a finding of prejudicial error, that does not transform the fundamental nature of the question actually presented for review. To misconstrue the issue as one of prosecutorial misconduct distorts the required analysis.

The lower court's principal justification for finding that introduction of the evidence at issue here did not comprise plain error was that, "the Raucci criminal association was sufficiently intertwined with the origins of the Rosenfeld/Scolieri conspiracy . . . that some reference to that association was bound to get before the jury." 5a. The "intertwining" referred to by the court related to

Rosenfeld's testimony on direct examination about his own pre-existing criminal association with Raucci.

The panel decision ignores the critical distinction between evidence of Rosenfeld's association with Raucci and evidence that the accused associated with Raucci. The law prohibiting the introduction of such evidence is designed to protect the criminal accused from the unfairness of evidence of guilt by association. That Rosenfeld, as a government witness, chose to describe his own history with Raucci provides no basis for justifying the admission of pervasive allegations that Petitioner associated with convicted felons.

To hold otherwise is to permit the government to open the door for itself, using its own witnesses to identify other criminal associates, and then claiming license to demonstrate the association of those same people with the accused. Such conduct, despite its patent impropriety, is effectively ratified by the panel decision in this case.

The panel below also attempted to justify the affirmance by holding that, "some of the evidence . . . came into the record appropriately in response to defense contentions." 5a. That rationale grievously misstates the record of the case. In his briefs below, Petitioner provided explicit citations to the record for each of the objected to references. The record demonstrates that only one of the nearly twenty improper references identified in the briefs could in any way be construed as a "response to defense contentions." This theory presents a further distortion of fact in an effort to justify the result below.

The panel concluded that, "While there are a few instances in which we might fault the government for its emphasis on Raucci organization connections, we are confident that those instances did not cause significant incremental prejudice to Scolieri." xxa. The level of prejudice required to demonstrate plain error under *Olano* is one of the issues to be resolved here.

Whatever standard is applied, if the references complained of in this appeal do not demonstrate significant prejudice to the accused, then there is no such thing. Here, the bottom line is that Petitioner's conviction rests on the testimony of Michael Rosenfeld and Irvin Levie—two inherently unreliable witnesses whose accusations against the accused were made more credible by the government's persistent and pervasive references to criminal associates, criminal organizations, "tough guys", and even old men stealing cars. As previously stated, to affirm the conviction on the record presented here is to push standards of fairness to the edge of becoming irrelevancies. It is respectfully submitted that this Petition should be granted to restore some measure of discipline to the law and to close the door to broad evidentiary abuses that was opened by the decision below.

II. THIS COURT SHOULD RULE ON THE PROPRIETY OF THE "TWO-INFERENCE CHARGE" USED BY DISTRICT COURTS TO DEFINE THE STANDARD OF PROOF IN CRIMINAL TRIALS.

The trial court's instructions to the jury on the burden of proof incorporated the so-called "two-inference charge". The instructions provided that if the jury viewed the evidence in the case as reasonably permitting either the inference that the defendant was guilty, or the inference that the defendant was not guilty, then the jury should vote to acquit. 12a.

Alhtough the two-inference rule is not, to counsel's knowledge, part of the standard charge approved by any circuit and has been expressly disapproved by the Second Circuit, the charge nonetheless appears as part of the standard instructions used by a number of district court judges, including the trial judge in this case.

The Second Circuit reviewed the charge in *United States v. Hughes*, 389 F.d2 535 (2d Cir. 1968) and found that it unconstitutionally diluted the standard of proof beyond a reasonable doubt. Also, see, Sand,

Modern Federal Jury Instructions, Vol. I, § 4.01, p. 4-17 (1993), noting that courts are in general agreement that the two-inference charge should not be given.

Because the issue affects one of the core constitutional rights of a criminal accused, i.e., the right to liberty except upon proof beyond a reasonable doubt of complicity in criminal wrongdoing, Petitioner respectfully submits that review is warranted.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3018

UNITED STATES OF AMERICA

v.

JOSEPH P. SCOLIERI; GARY E. REDER; GREGORY SCOLIERI; RICHARD BROWN

JOSEPH P. SCOLIERI,

Appellant

Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Crim. No. 93-cr-00099-01)
District Judge: Honorable Alan N. Bloch

Argued August 2, 1994

BEFORE: STAPLETON and GREENBERG, *Circuit Judges,* and ATKINS, *District Judge* *

Opinion filed Aug. 18, 1994

MEMORANDUM OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Joseph P. Scolieri, Jr., was convicted on various counts of drug trafficking, money structuring, money laundering,

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* Hon. C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

and tax offenses and appeals on grounds of prosecutorial misconduct as well as sufficiency of the evidence as to specific counts. For the reasons stated below, we will affirm the district court's judgment.

I.

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231 and this court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

We review the trial proceedings for prosecutorial misconduct under the plain error standard because defense counsel did not object to the allegedly prejudicial testimony during trial. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). The Supreme Court recently explained the plain error standard as containing three elements: an error, that is plain, and that affects substantial rights. *United States v. Olano,* 113 S. Ct. 1770, 1776 (1993). Furthermore, because a Rule 52(b) correction is discretionary, the Court of Appeals should only exercise its discretion when "the error ' "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." ' " *Olano,* 113 S. Ct. at 1779 (quoting *United States v. Young,* 470 U.S. 1, 15 (1985) (quoting *United States v. Atkinson,* 297 U.S. 157, 160 (1936))). The Supreme Court defined the elements of plain error as follows: An "error" is a deviation from a legal rule that has not been intentionally waived. An error is "plain" if it is clear or obvious. *Id.* at 1777. The error "affects substantial rights" if it is prejudicial and therefore affected the outcome of the trial. *Id.* at 1777-78. The defendant, rather than the government, bears the burden of persuasion on the element of prejudice under the plain error standard. *Id.* at 1778.

Scolieri also attacks the sufficiency of the evidence on particular counts. Sufficiency of the evidence is normally

reviewed under the "substantial evidence" standard under which all credibility issues are viewed in the light most favorable to the government and the reviewing court determines whether there is substantial evidence from which a rational jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Gonzalez,* 918 F.2d 1129, 1132 (3d Cir. 1990), *cert. denied,* 498 U.S. 1107, *and cert. denied,* 499 U.S. 968, *and cert. denied,* 499 U.S. 982 (1991); *Government of the Virgin Islands v. Williams,* 739 F.2d 936, 940 (3d Cir. 1984).

Defendant did not object to the sufficiency of the evidence as to Counts Two, Eight, and Nine. They are therefore reviewed under the plain error standard. During trial, defendant objected to the sufficiency of the evidence as to Counts Ten through Thirteen, the money structuring counts, but failed to renew this objection at the close of evidence. The sufficiency of the evidence on the money structuring counts was therefore not properly preserved on appeal. *See United States v. Wright-Barker,* 784 F.2d 161, 170 (3d Cir. 1986); *United States v. Giampa,* 758 F.2d 928, 936 n. 1 (3d Cir. 1985). The evidence as to all of the challenged counts is therefore reviewed under the plain error standard. *United States v. Barel,* 939 F.2d 26, 37 (3d Cir. 1991). Where a reviewing court finds there is insufficient evidence to uphold a conviction, however, the court should exercise its discretion under the plain error standard because a conviction upon evidence insufficient to meet the "beyond a reasonable doubt" standard violates a defendant's Due Process rights and constitutes a miscarriage of justice. *Cf. Barel,* 939 F.2d at 37.

II.

Scolieri was charged with participating in a drug conspiracy and with various financial offenses related to the drug conspiracy, including tax evasion, money structuring, and money laundering. He was convicted on all twenty counts and was sentenced to fifteen years.

Prior to defendant's arrest, Michael Rosenfeld, his alleged partner in the drug conspiracy, had been convicted and sentenced to twelve years on unrelated racketeering and drug charges. Irwin Levie, the alleged Florida drug source for the Rosenfeld-Scolieri drug conspiracy, was convicted along with Rosenfeld and received a sentence of thirteen years. Rosenfeld and Levie were the main government witnesses to testify against Scolieri. Both entered into an agreement with the government prior to testifying, pursuant to which the government would submit motions for reconsiderations of their sentences if they testified truthfully. Following Scolieri's conviction, Rosenfeld's and Levie's sentences were each reduced to five years.

The trial transcript contains many references to activities of an alleged criminal association in Penn Hills headed by Lou Raucci, Sr., as well as references to criminal activities of others not directly connected to Scolieri's activities. The trial transcript also contains a reference that witnesses Michael Rosenfeld and his sister Gabriel might have entered a witness protection program as part of their agreement to testify against Scolieri. Defense counsel did not object to the criminal association and witness protection testimony during the trial.

Two general arguments are raised by defendant on appeal: first, that evidence introduced during the trial constitutes plain error which requires reversal of the convictions in their entirety and a new trial; second, that there was insufficient evidence to convict Scolieri of Counts Two, Eight, Nine, and Ten through Fourteen such that the convictions on these counts must be reversed. Additionally, Scolieri appeals on the ground that the district court's jury charge on the burden of proof constituted plain error.

III. PROSECUTORIAL MISCONDUCT

Much of the evidence relating to the criminal activities of the Raucci criminal association was relevant to the charged conspiracy. Specifically, the evidence was used

to explain how Scolieri and Michael Rosenfeld came to be partners in the charged conspiracy. Moreover, the trial judge could have reasonably inferred that defense counsel's failure to object to the allegedly prejudicial testimony was part of a defense strategy to discredit the testimony of Michael Rosenfeld, the government's main witness. The evidence could have been used to attack Rosenfeld's credibility as he, and not Scolieri, was alleged to have been a member of the Raucci criminal syndicate. The witness protection program evidence was likewise more probative of the witnesses' fear of Raucci's associates, rather than their fear of Scolieri. Such testimony may also have been intended to discredit the testimony of Michael and Gabriel Rosenfeld by raising an inference that receiving government immunity provided these witnesses with a motive to lie. Admission of the testimony regarding the Raucci criminal association and the witnesses protection program testimony was therefore not an obvious error.

Our review of the record convinces us that the Raucci criminal association was sufficiently intertwined with the origins of the Rosenfeld/Scolieri conspiracy and the conduct of the members of that conspiracy in the course of its operation that some reference to that association was bound to get before the jury in the course of Scolieri's trial. Moreover, some of the evidence regarding that association came into the record appropriately in response to defense contentions. While there are a few instances in which we might fault the government for its emphasis on Raucci organization connections, we are confident that those instances did not cause significant incremental prejudice to Scolieri.

Cases cited by defendant are not to the contrary. In *United States v. Singleterry*, 646 F.2d 1014 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit held that evidence of the criminal conduct of defendant's associate was plain error. The *Singleterry* decision can be distinguished from the instant appeal on three grounds.

First, the prosecutor's questioning was used to improperly establish the prior conviction of a co-defendant. Second, the defendant was not charged with a conspiracy so the earlier drug conviction of his co-defendant brother did not bear on the current drug charge. Third, in deciding to reverse, the *Singleterry* court noted that the prosecutor in question had been cited for improper trial tactics in three prior appeals to the court and because the court's "message [in the earlier opinions] should have been clear" it would "issue no further warnings." *Id.* at 1019-20.

The other cases cited by deefndant involve reversals of convictions based on testimony concerning the criminal acts of others under a more lenient standard of review. The analysis of those courts is therefore inapposite to a Rule 52(b) review. Furthermore, the facts of those case are distinguishable. *See, e.g., United States v. McConnell,* 988 F.2d 530, 535 (5th Cir. 1993) (evidence of prior bad acts of others improper where foundation for relevancy to present case not established); *United States v. Cardall,* 885 F.2d 656, 671 (10th Cir. 1989) (holding other bad acts exception in Fed. R. Evid. 404(b) does not apply to bad acts of the defendant's associates); *United States v. Romo,* 669 F.2d 285, 287-88 (5th Cir. 1982) (finding evidence of drug conspiracy involving others known to defendant irrelevant to unrelated drug conspiracy except to show "guilt by association" which was improper purpose); *United States v. Whitaker,* 619 F.2d 1142, 1146-48 (5th Cir. 1980) (bad acts of others not relevant; no conspiracy charges); *United States v. Brumley,* 560 F.2d 1268, 1280 (5th Cir. 1977) (same).

IV. SUFFICIENCY OF THE EVIDENCE

Defendant appeals his convictions of Counts Two, Eight, Nine, and Ten through Fourteen on the ground there was insufficient evidence to support these convictions.

Count Two involved a violation of 21 U.S.C. §§ 841 (a)(1) and 841(b)(1)(B), possession of cocaine with

intent to distribute. App. 15. Count One involved the conspiracy to possess with intent to distribute cocaine and Count Two charged a substantive offense relating to a specific incident involving Scolieri and co-defendant Richard Brown which was alleged to have taken place on approximately December 5, 1989 in the Western District of Pennsylvania. The evidence in the record establishes that Scolieri was in Florida "around Tranksgiving" 1989 and that Brown then delivered drugs from Florida to Pennsylvania in early December. App. 438-39. Defendant does not challenge the sufficiency of the evidence as to the conspiracy charge (which included Brown as a co-conspirator), but rather argues that the cumulative effect of the conspiracy evidence cannot be used to support the specific charge at Count Two. Defendant cites no caselaw for this proposition and we find the argument unpersuasive.

As to the nature of the conspiracy, the following evidence was presented: Scolieri's role was to sell the drugs in Pennsylvania; eventually his role expanded to include purchasing the drugs from Levie in Florida; Brown was the "drug runner" who picked up the drugs from Levie after they were paid for and drove them back to Pennsylvania. A rational jury could infer from this evidence, coupled with the evidence that Scolieri made a trip to Florida around Thanksgiving 1989 during which he saw Levie (his cocaine source) with money for cocaine and that Brown (the drug runner) then made a trip to Florida and obtained the cocaine from Levie, that Brown returned to Pennsylvania with the drugs and that Scolieri then actually or constructively possessed the cocaine in Pennsylvania with intent to distribute. *Cf. United States v. Ahumada-Avalos,* 875 F.2d 681 (9th Cir.) (holding evidence was sufficient to support finding that defendant participated in distributing drugs in the Eastern District of Washington when he arranged for delivery, made telephone calls to negotiate the terms of the sale, and traveled in furtherance of the crime while in the district), *cert.*

denied, 493 U.S. 837 (1989). We therefore find the evidence sufficient to sustain a conviction at Count Two under the plain error standard.

Counts Eight and Nine charged defendant with violations of 26 U.S.C. § 7206(2) for assisting in the preparation of Michael Rosenfeld's false income tax returns. App. 22-23. Pursuant to this statute, a person is guilty of a felony if she

> [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is within the knowledge or consent of the person authorized or required to present such return . . . .

26 U.S.C. § 7206(2). Testimony presented at trial indicated that Scolieri had presented cash to Rosenfeld or his agents, in exchange for checks issued to Scolieri by Rosenfeld's "company," MSR Contractors. The checks were issued in connection with invoices reflecting subcontracting work purportedly performed by Scolieri. These payments to Scolieri were later deducted as business expenses on Rosenfeld's tax returns. Testimony further demonstrated that Rosenfeld's company was a "front" established to allow Rosenfeld to show legitimate income and explain his large cash flow, that the MSR checks were a means by which Scolieri laundered drug money, that Scolieri never did subcontracting work for Rosenfeld, and that the receipts were therefore false. The trial record also contains evidence that Scolieri had assisted in the preparation of his own tax returns by an accountant that also worked for Rosenfeld, including the preparation of a schedule C which is used for business deductions.

Maintaining the contractor/subcontractor "front" was beneficial to both Rosenfeld and Scolieri and maintaining that front, as Scolieri must have realized, would lead

to Rosenfeld's deducting the subcontractor payments on his tax returns. Given the relationship between Rosenfeld and Scolieri and the fact that they were both benefitting from the contractor/subcontractor front, we believe a rational factfinder could infer that Scolieri and Rosenfeld were joint participants in setting up and maintaining that front, that Scolieri knew the receipts would be used as the basis for a business expense deduction on Rosenfeld's tax returns, and that Scolieri "procure[d] . . . [and] advise[d] the preparation . . . of [Rosenfeld's] return . . . which [was] fraudulent or is false as to [a] material matter." The evidence is thus sufficient to sustain the conviction on Counts Eight and Nine.

Defendant suggests that the statute was not intended to reach the type of procurement and assistance presented by this case, but was instead aimed at official tax preparers who help prepare the actual taxation documents. Caselaw does not support this narrow view of the statute. In *United States v. McCrane*, 527 F.2d 906, 913 (3d Cir. 1975), a prior panel of this court rejected just this argument. In that case the defendant was convicted for providing false invoices to campaign contributors so that they could deduct the contributions as business expenses on their tax returns. The court found this conduct within the purview of section 7206(2). *Id.; accord United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976) (rejecting argument that section 7206(2) applies only to tax preparers); *see also United States v. La Haye*, 548 F.2d 474 (3d Cir. 1977) (holding that arranging for another person to collect the proceeds of a winning horse racing ticket by giving his name instead of the winner's on the required IRS form falls within the statute).

Courts Ten through Fourteen involved structuring monetary transactions to avoid IRS reporting requirements in violation of 31 U.S.C. § 5324(3). IRS regulations require banks and others to report cash transactions involving more than $10,000. 31 U.S.C. § 103.22(a). Scolieri was charged with specific incidents in which

transactions of more than $10,000 were deliberately broken down or "structured" into several transactions, for example by obtaining multiple cashier checks from different banks, so that each one involved cash of less than $10,000.

Defendant argues that the government did not prove that he acted with knowledge that his structuring conduct was illegal. The Supreme Court recently clarified the standard of proof necessary for a conviction under 31 U.S.C. § 5324(3). In *Ratzlaf v. United States,* the Supreme Court held that "[t]o establish that a defendant 'willfully violate[d]' the antistructuring statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." 114 S. Ct. 655, 657 (1994) (quoting 31 U.S.C. § 5322(a)) (alterations in original). The government therefore had to prove, as the district court charged the jury, that Scolieri knew that structuring transactions in order to avoid the reporting requirements was a crime.

The evidence as to defendant's involvement in structuring schemes is found principally at App. 518, 577, 631, 657, 793-813. The evidence pertains to a number of business investments in which defendant invested cash allegedly obtained from illegal drug deals. In some of these business transactions, defendant made a cash investment and was alleged to have indicated that the recipient should structure transactions involving the cash to avoid the IRS reporting requirement. *See e.g.,* App. 518-20, 577-80, 796. In other transactions, defendant is alleged to have structured banking transactions himself. App. 797. There is also evidence that Scolieri engaged in activities to avoid other types of reports to the IRS. *See* App. 742 (use of nominee accounts and money orders). While there is direct evidence that defendant intended to evade the IRS reporting requirements, there is no direct evidence that defendant knew that intentionally evading these reporting requirements was illegal. The convictions of Counts Ten

through Fourteen can only be sustained if there was sufficient circumstantial evidence from which a jury could infer Scolieri willfully violated the anti-structuring statute.

In addition to finding Scolieri guilty of the four structuring charges, the jury also found him guilty of tax evasion and guilty of four counts of money laundering. The laundered moneys were the same funds used in the structured transactions. The jury thus found that the structuring transactions involved tainted drug money. This provides an additional factor from which the jury could infer defendant acted with knowledge that the structuring itself was illegal. Finally, Gary Reder, Scolieri's accountant and close friend and the government's main witness on the structuring counts, testified as follows with respect to an occasion in which Scolieri took him to two different banks to get bank checks for less than $10,000:

> Prior to that [the structured transaction charged at Count Fourteen to which Reder pled guilty] I had no reason to believe we were skirting any banking laws or whatever. At that day with the two transactions I knew that there was no reason to go to two separate institutions.

App. 658. The jury could have inferred that Reder was here admitting he knew that he and Scolieri were violating the anti-structuring statute, 31 U.S.C. § 5324(3), a "banking law," when they structured the transaction charged at Count Fourteen. The jury could have discredited Reder's testimony that he had knowledge of the banking law violation *only* at the time of the last structured transaction charged, the only one he pled guilty to, and could have inferred that Reder acted with such knowledge as to prior transactions as well. Finally, given Scolieri's structuring activity, his drug money laundering activity, and his superior/subordinant relationship with Reder, we believe a rational jury could have inferred that Scolieri, who led Reder to the banks involved in the transactions at Count Fourteen, also knew of the illegality of structuring.

In short, evidence as to the criminal source of Scolieri's money, evidence of Scolieri's knowledge of other methods to hide drug money, and Reder's testimony provide sufficient evidence from which a rational jury could infer that Scolieri acted with knowledge that structuring was illegal. The evidence as to Counts Ten through Fourteen was therefore sufficient to sustain those convictions.

V. JURY CHARGE ERROR

Defendant's final argument on appeal is that the district court erred in giving a jury charge which incorporated the "two-inference" rule and that such charge was plain error. In charging the jury, the district court stated:

> Unless the Government proves beyond a reasonable doubt that the defendant has committed each and every essential element of the offense with which he is charged, you must find him not guilty.
>
> If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should adopt the conclusion of innocence and return a verdict of not guilty. You must remember that a defendant is never to be convicted on mere suspicion or conjecture.
>
> It is your job to decide if the Government has proved the guilt of the defendant beyond a reasonable doubt. . . .

App. 983.

Defendant attacks the second paragraph quoted above on the ground that it dilutes the "beyond a reasonable doubt" standard by introducing notions of a "preponderance of the evidence" civil standard. Defendant argues that this charge creates the possibility that the jury will misinterpret the criminal standard to be less than beyond a reasonable doubt.

Defendant cites *United States v. Hughes*, 389 F.2d 535 (2d Cir. 1968). In that case, the Court of Appeals for the Second Circuit found that a similar charge, coupled with improper remarks by the prosecution which were objected to during trial, made a new trial necessary.[1] The defective charge in *Hughes* came at the end of the entire jury charge shortly before the jury retired and was prefaced with the phrase, "In the final analysis". *Hughes*, 389 F.2d at 537 (quoting jury charge). The jury charge in this case comprises sixty-one pages of the trial transcript. The allegedly improper portion appears on the sixth page and was prefaced by a clear statement of the correct standard and was followed by a reiteration of the correct standard as well. The reasonable doubt standard was also reiterated as to the elements of each offense charged. *E.g.*, App. 989-95, 1001, 1003-06, 1025-27, 1030-32. Moreover, the charge at issue in *Hughes* instructed the jury to acquit upon a finding "that it is more likely the defendant is innocent than guilty." That statement more clearly creates the possibility that the jury will convict if it finds it is more likely the defendant is guilty than innocent.

The charge in this case never juxtaposed the "more likely" standard with innocence or guilt. Rather, the jury was instructed that upon concluding that either guilt or innocence could be inferred, they must infer innocence. The challenged portion of the charge is an accurate statement of the law and given the emphasis on the proof

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[1] The offensive jury charge in *Hughes* was as follows:

> In the final analysis, then, if you find that the evidence respecting the defendant is as consistent with innocence as with guilt, or that it is more likely that the defendant is innocent then guilty, then you should acquit him. If you find that the law has not been violated you should not hesitate for any reason to return a verdict of not guilty, because that is the law.

Hughes, 289 F.2d at 537 (quoting jury charge).

beyond a reasonable doubt standard in the remainder of the charge, we think it highly unlikely that any so-called dilution occurred here. We perceive no error, much less plain error, in the charge read as a whole. *Cf. Government of V.I. v. Parrilla*, 7 F.3d 1097, 1101-06 (3d Cir. 1993) (finding jury instruction that "infliction of injury is presumptive evidence of intent" was plain error because it allowed conviction upon insufficient proof of an element of the offense and holding statute that created presumption was unconstitutional); *Government of V.I. v. Smith*, 949 F.2d 677, 684 (3d Cir. 1991) (holding failure to instruct jury that burden of proof on element of self-defense rested with government was plain error where defendant's entire case rested on self-defense claim).

VI.

The judgment of conviction and sentence will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3018

UNITED STATES OF AMERICA

v.

JOSEPH P. SCOLIERI; GARY E. REDER; GREGORY SCOLIERI; RICHARD BROWN

JOSEPH P. SCOLIERI,

Appellant

Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Crim. No. 93-cr-00099-01)
District Judge: Honorable Alan N. Bloch

Argued August 2, 1994

BEFORE: STAPLETON and GREENBERG, *Circuit Judges,* and ATKINS, *District Judge* *

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Western District of Pennsylvania and was argued on August 2, 1994.

On consideration whereof, it is

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* Hon. C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

ORDERED AND ADJUDGED by this Court that the judgment of the district court entered January 7, 1994, be and the same is hereby affirmed.

ATTEST

/s/ [Illegible]
Chief Deputy Clerk

Dated: Aug. 18, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3018

UNITED STATES OF AMERICA

v.

JOSEPH P. SCOLIERI; GARY E. REDER; GREGORY SCOLIERI; RICHARD BROWN

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

/s/ Walter K. Stapleton
Circuit Judge

Dated: Sep. 19, 1994